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SK TANGAKALISWARAN KRISHNAN

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS

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FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
[CRIMINAL APPEAL NO: 05-50-2009(W)]

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16 OCTOBER 2009

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Representation to Appeal Board - Recommendations to Yang di-Pertuan Agong - Conflicting evidence whether Appeal Board made*

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recommendations to His Majesty within prescribed time - Whether burden of proof not discharged - Whether detenu entitled to rely on version most favourable to him - Whether fatal - Federal Constitution, art. 151(1) - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 6(1)

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PREVENTIVE DETENTION: *Habeas Corpus - Detention, legality of - Representation to Appeal Board - Conflicting evidence whether Appeal Board made recommendations to Yang di-Pertuan Agong within prescribed time - Whether burden of proof not discharged - Whether*

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detenu entitled to rely on version most favourable to him - Whether fatal - Federal Constitution art. 151(1) - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 6(1)

In this appeal against the decision of the High Court dismissing the appellant's application for a writ of *habeas corpus* against his

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detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'), the appellant argued, primarily, that his detention was fatally flawed and unlawful as the Appeal Board, to whom he had earlier submitted a representation for his release, had failed to submit or prove that they had

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submitted a recommendation to the Yang di-Pertuan Agong within the prescribed three months time frame as required by art. 151(1)(b) of the Federal Constitution read with s. 6(1) of the Ordinance. The appellant was detained on 17 November 2008 pursuant to s. 4(1) of the Ordinance. The facts showed that the

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first respondent, the Minister of Home Affairs, *vide* his affidavit of 31 March 2009, affirmed that the Board, as at the date of his affidavit, had not made any recommendations to the Yang di-

Pertuan Agong. This, however, contradicted the deposition of the Secretary to the Board who, in his affidavit dated 20 April 2009, stated that recommendations had been submitted to his Majesty on 13 January 2009. The discrepancy had not been anywhere explained, and consequently, before the learned justices of appeal herein, issues arose as to whether the appellant could rely on the version or inference most favourable to him, and if so whether that was sufficient in the circumstances of the case to earn him an order in terms of his application.

Held (allowing appeal and setting appellant at liberty)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) It is for the respondents to prove that the constitutional and statutory safeguards as embodied in art. 151 of the Constitution and s. 6(1) of the Ordinance had been strictly complied with. The liberty of an individual should not be infringed upon without proof that the impugned infringement is in accordance with the Constitution and statute. (para 6)

(2) Where a party upon whom the onus of proof lies adduces conflicting evidence, a court assessing that evidence is entitled to rule that the burden has not been discharged. Further, in a matter as important as an individual liberty, the detenu is entitled to rely on the version that is most favourable to him. (para 6)

(3) The respondents have failed to show that the recommendations of the Advisory Board were made to His Majesty within the three months prescribed by art. 151 and s. 6(1). In these circumstances, *habeas corpus* should have been issued by the High Court. (para 7)

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan semasa terhadap keputusan Mahkamah Tinggi kerana menolak permohonan perayu untuk writ *habeas corpus* ekoran penahanan beliau di bawah Ordinan Darurat (Keselamatan Awam dan Pencegahan Jenayah) 1969 ('Ordinan'), perayu berhujah, secara pentingnya, bahawa penahanannya adalah cacat secara yang memudaratkan dan tidak sah oleh kerana Lembaga Rayuan, kepada siapa beliau telah membuat representasi untuk pembebasan sebelumnya, telah gagal membuat atau gagal

membuktikan bahawa mereka telah membuat apa-apa syor kepada Yang di Pertuan Agong dalam tempoh tiga bulan seperti yang dikehendaki oleh fasal 151(1)(b) Perlembagaan Persekutuan di baca bersama dengan s. 6(1) Ordinan. Perayu ditahan pada 17 November 2008 di bawah s. 4(1) Ordinan. Fakta menunjukkan bahawa responden pertama, Menteri Dalam Negeri, melalui afidavitnya bertarikh 31 Mac 2009, telah mengesahkan bahawa setakat tarikh tersebut tiada apa-apa syor telah dikemukakan oleh Lembaga Rayuan kepada Yang di-Pertuan Agong. Ini bagaimanapun bertentangan dengan keterangan Setiausaha kepada Lembaga Rayuan yang, melalui afidavitnya bertarikh 20 April 2009, menyatakan bahawa syor sedemikian telah dibuat pada 13 Januari 2009. Perselisihan ini langsung tidak diperjelas, dan oleh hal yang demikian, di hadapan yang arif hakim-hakim rayuan, berbangkit persoalan sama ada perayu boleh bergantung kepada versi atau inferens yang lebih memihak kepadanya, dan jika begitu sama ada ianya memadai dalam halkeadaan yang wujud untuk perayu memperoleh perintah yang selaras dengan terma-terma permohonannya.

Diputuskan (membenarkan rayuan dan membebaskan perayu)

Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Menjadi kewajipan responden untuk membuktikan bahawa segala perlindungan perlembagaan dan stautori seperti yang termaktub di dalam fasal 151 Perlembagaan dan s. 6(1) Ordinan telah dipatuhi dengan ketatnya. Kebebasan seseorang individu tidak boleh dicabuli tanpa bukti bahawa pencabulan sedemikian dibenarkan oleh Perlembagaan dan statut.

(2) Jika satu pihak yang memikul beban bukti mengemukakan bukti yang bertentangan antara satu dengan lain, maka mahkamah, dalam menilai bukti-bukti tersebut, berhak merumuskan bahawa beban tersebut telah gagal dipenuhi. Selain itu, dalam perkara sepenting kebebasan seorang individu, seseorang detenu berhak untuk bergantung kepada versi yang paling memihak kepadanya.

(3) Responden-responden telah gagal membuktikan bahawa syor Lembaga Rayuan telah dikemukakan kepada DYMM Tuanku dalam tempoh tiga bulan seperti yang ditetapkan oleh fasal 151 dan s. 6(1). Dalam halkeadaan yang wujud, *habeas corpus* seharusnya dibenarkan oleh Mahkamah Tinggi.

Case(s) referred to:

Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals [1988] 1 LNS 162 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 ***(refd)***

Government of Malaysia v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***

Mohamed Ezam v. Ketua Polis Negara [2002] 4 CLJ 309 FC ***(refd)***

Mohinuddin v. District Magistrate, Beed AIR [1987] SC 1977 ***(refd)***

Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132 ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3, 4(1), (4), 6(1)

Federal Constitution, arts. 5(3), 15(1)(b)

Internal Security Act 1960, ss. 8, 73

Constitution of India [Ind], art. 22

For the appellant - Datuk Baljit Singh (Abdul Shukor Ahmad with him); M/s Shukor Baljit & Partners

For the respondents - Najib Zakaria; SFC

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-51-2009]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram FCJ:

[1] This is an appeal against the refusal of the High Court to issue *habeas corpus* for the appellant's release from custody. The relevant facts of the case are these. On 17 November 2008, the Minister for Home Affairs, the first respondent before us, made an order directing the appellant's detention for a period of two years. The order was made pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance) which provides:

> 4(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order directing that that person be detained for any period not exceeding two years.

[2] Pursuant to sub-s. (4) of the same section, a statutory statement setting out the facts and grounds of his detention (also dated 17 November 2008) was served upon the appellant. On 18 November 2008, the appellant made representations against the making of the order to the Advisory Board constituted under art. 151 of the Federal Constitution. Under cl. (1)(b) of that article and by virtue of s. 6(1) of the Ordinance, the Board must consider the representations and make its recommendations thereon to the Yang di-Pertuan Agong (in truth His Majesty acting on the advice of the Minister) within three months of receiving the representations in question or within such longer period as the Yang di-Pertuan Agong may allow. The Advisory Board entertained the appellant's representations. But it is uncertain as whether it made its recommendations to His Majesty within the constitutionally prescribed three month period which in the present instance expired on 17 February 2009. I will say why in a moment. Returning to the mainstream, the appellant on 17 March 2009 filed an application for an order of *habeas corpus* which was heard and dismissed by the learned judicial commissioner.

[3] Before us one of the main grounds urged in support of the appeal is that the detention is bad because the Board failed to make its recommendations within the constitutionally and statutorily prescribed three month period; no question of any extension arising in this case. In the alternative it is submitted that at best the burden of showing that the recommendations were made within time had not been discharged by the respondents. This latter submission brings into sharp focus the uncertainty of which I spoke of earlier.

[4] There appears to be a sharp conflict in and between the affidavit evidence produced by the respondents in answer to the appellant's application for *habeas corpus*. The first respondent in para. 15 of his affidavit dated 31 March 2009 categorically states that the Board had not as at the date of his affidavit made its recommendations to the Yang di-Pertuan Agong. This however is contradicted by the secretary to the Board who in his affidavit of 20 April 2009 states that the Board's recommendations were made to His Majesty on 13 January 2009. It is significant that even after the secretary to the Board had filed his affidavit, no attempt was made to explain the discrepancy in the dates. How then is the issue to be resolved?

[5] In my considered judgment the point at stake falls to be resolved with reference to the principles governing the burden of proof in an application for *habeas corpus*. It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals* [1988] 1 LNS 162. In *Mohinuddin v. District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 22 of the Indian Constitution from which is drawn our art. 151:

> It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

[6] So too here. It is for the respondents to prove that the constitutional and statutory safeguards embodied in art. 151 and s. 6(1) were strictly complied with. The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute. When considering whether a restraint upon liberty is in accordance with law it is to the evidence furnished by the detaining authority that a court must turn in the usual way. And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection. One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. See, *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18. Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is

entitled to rely on the version that is most favourable to him. Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn. I must therefore respectfully reject the invitation of learned senior federal counsel to accept the secretary's evidence and reject that of the minister as inaccurate. Both affidavits were filed on behalf of the detaining authority and it is not, generally speaking, in accordance with the principles governing the evaluation of affidavit evidence that one deponent's version of the facts should be preferred to another when both are giving evidence for the same side.

[7] Applying the principles I have referred to earlier in this judgment, it is my considered view that the respondents have failed to show that the recommendations of the Advisory Board were made to His Majesty within the three months prescribed by art. 151 and s. 6(1). In these circumstances *habeas corpus* should have been issued by the High Court. Although the learned judicial commissioner in his judgment considered the points raised by the appellant he unfortunately overlooked this aspect of the case and as such his judgment is flawed and cannot stand.

[8] In his oral and written arguments the appellant raised additional grounds in support of the appeal. Among these is the sustained submission that s. 3 of the Ordinance (which has to do with the arrest of persons by the police) should be read together with s. 4. The appellant relies on the following proposition which is extracted from the headnote to the report of *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132 which was a decision that considered the equipollent sections in the Internal Security Act 1960:

> The police power of arrest and detention under section 73 of the Internal Security Act could not be separated from the ministerial power to issue an order of detention. There is only one preventive detention and that is based on the order to be made by the Minister under section 8 of the Act. However, the Minister will not be in a position to make that order unless information and evidence are brought before him, and, for this purpose, the police are entrusted by the Act to carry out the necessary investigation and, pending inquiries, to arrest and detain

a person in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under section 8 of the Act.

[9] This court in two decisions namely, *Mohamed Ezam v. Ketua Polis Negara* [2002] 4 CLJ 309 and *Government of Malaysia v. Nasharuddin Nasir* [2004] 1 CLJ 81 departed from *Theresa Lim Chin Chin* on this point. The appellant's argument is that this departure is an error. It is submitted that a violation of the a detenu's rights guaranteed by art. 5(3) of the Federal Constitution at the stage of his arrest, whether under s. 3 of the Ordinance or s. 73 of the Act of 1960 would taint and render invalid the detention order made under s. 4 of the Ordinance or s. 8 of the aforesaid Act. While I do not say that these arguments are without merit – indeed I express no view upon them – I find it unnecessary to deal with them by reason of the conclusion I have reached. Any view I express upon the point will be purely obiter.

[10] For the reasons already given I would allow the appeal and order the respondents to produce the appellant before this court to be set at liberty forthwith.

[11] The Chief Justice and my learned brother Zulkefli bin Ahmad Makinudin, FCJ have seen this judgment in draft and have expressed their agreement with it.